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IN PRACTICE

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Third Circuit Rides the Class-Action Arbitration Waive

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In *Quilloin v. Tenet HealthSystem Philadelphia*, the U.S. Court of Appeals for the Third Circuit, following the U.S. Supreme Court's lead and its own precedent, endorsed the validity of class-action waivers in predispute employment arbitration agreements. According to the *Quilloin* court, the Federal Arbitration Act pre-empts state laws that would invalidate such waivers. As a result, employers may wish to include class-action waivers in their arbitration agreements. The decision also includes concrete guidance to help ensure that disputes are resolved in arbitration, not in court. In particular, *Quilloin* makes clear that an employment arbitration agreement should include a provision indicating, in substance, that the parties agree to submit any issues or disputes regarding arbitrability to the arbitrator.

In *Quilloin*, plaintiff Janice Quilloin, a registered nurse, worked at a Tenet Healthcare Corporation hospital from October 2006 to February 2008, when she resigned to take another job. She subsequently returned to the hospital, continuing her employment from December 2008 to November 2009. Both when the hospital initially hired her and when it rehired her, Quilloin signed a form acknowledging receipt of a "fair treatment process" brochure, which described Tenet's dispute resolution process, including mandatory arbitration.

The acknowledgment stated, among other things, that Quilloin was voluntarily agreeing to use the hospital's "fair treatment process" (FTP) and to submit claims and disputes related to her employment or the termination of her employment to binding arbitration. The FTP brochure stated that the process covered "all disputes relating to or arising out of an employee's employment with the company or the termination of employment." The brochure also dictated certain internal dispute resolution steps for an employee to follow before initiating arbitration.

In December 2009, Quilloin filed a lawsuit against Tenet in the U.S. District Court for the Eastern District of Pennsylvania. In the lawsuit, Quilloin asserted a collective action under the Fair Labor Standards Act and various state law "class action and common law claims." Quilloin alleged that Tenet had failed to compensate her and her co-workers for work they had performed during meal breaks. Tenet filed a motion to compel arbitration.

The district court denied the motion without prejudice, "finding that genuine disputes of material fact remained as to whether the arbitration agreement was enforceable." In particular, the court ordered the parties to pursue additional discovery regarding whether the agreement was substantively and procedurally unconscionable. Tenet appealed.

On appeal, Tenet argued that, because Quilloin was challenging the entire arbitration agreement rather than a specific provision, the arbitrator — not the court — should decide the issue of arbitrability. The Third Circuit disagreed.

The court explained that, as a general proposition, "questions of arbitrability, including challenges to an arbitration agreement's validity, are presumed to be questions for judicial determination." The court further explained that an exception exists where parties agree that questions of arbitrability will be decided by an arbitrator. Any such agreement, however, must be unambiguous. As the Third Circuit explained, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so."

The court observed that, although Quilloin had agreed to arbitrate her employment claims, she had not agreed to arbitrate disputes regarding arbitrability. The court explained, "[b]ecause the

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parties have not indicated otherwise, the question of arbitrability is one for the court." The court further explained, "[b]ecause Quilloin did not agree to arbitrate the issue of arbitrability, and because she claims that the arbitration agreement, specifically, is unconscionable, the District Court did not err in addressing the validity of the agreement to arbitrate."

The Third Circuit then addressed the merits of Quilloin's contention that the arbitration agreement was unconscionable. The court indicated that, in determining whether an arbitration agreement is unconscionable, state law contract principles apply unless they conflict with the Federal Arbitration Act (FAA), in which case the FAA pre-empts state law. Thus, the court explained that "in determining unconscionability, we must use principles of Pennsylvania law, to the extent that such law is not displaced by the FAA."

The Third Circuit explained that, in order to demonstrate unconscionability under Pennsylvania law, a party must establish that a contract is both substantively and procedurally unconscionable. According to the court, a contract is substantively unconscionable if it "unreasonably" or "grossly" favors one party. The court explained, however, that an arbitration agreement is not unconscionable if it does not limit or alter the rights and remedies available to a party in arbitration.

Quilloin argued that the agreement was substantively unconscionable because it included a "potential prohibition" on her ability to recover attorney fees. The court acknowledged that "[p]rovisions requiring parties to be responsible for their own expenses, including attorney fees, are generally unconscionable because restrictions on attorney fees conflict with federal statutes providing fee-shifting as a remedy." However, the arbitration agreement here was ambiguous as to whether the prevailing party could recover attorney fees.

On one hand, the agreement provided that the parties would be responsible for their own fees and costs. On the other hand, the agreement granted the arbitrator "the authority to award any remedy that would have been available to [the employee] had [the employee] litigated the dispute in court under applicable law." It also stated that "no remedies that otherwise would be available to [the employee] or the company in a court of law will be forfeited by virtue of the agreement to use and be bound by the FTP."

While the district court had held that this ambiguity precluded arbitration, the Third Circuit disagreed, holding that courts should not resolve such ambiguities by speculating that they would lead to unconscionable results. Instead, the Third Circuit explained, the ambiguity should be left to the arbitrator to resolve. According to the Third Circuit, "[t]he Supreme Court has clearly established that ambiguities in arbitration agreements must be interpreted by the arbitrator."

Quilloin also argued that the arbitration agreement was unconscionable because it was silent as to whether she could pursue class-action arbitration. Arbitration agreements that are silent as to class actions are generally construed as prohibiting them. Under Pennsylvania law, agreements that prohibit class-action arbitration are, under certain circumstances, unconscionable.

The Third Circuit rejected Quilloin's argument, concluding that this issue "of interpretation and procedure" should be decided by the arbitrator. Moreover, the court explained, even an express class-action waiver would not have rendered the arbitration agreement unconscionable.

In reaching this conclusion, the Third Circuit relied on the 2011 decision in *AT&T Mobility v. Concepcion*, in which the U.S. Supreme Court held that a California law deeming certain class-action waivers unconscionable was an obstacle to — and, therefore, pre-empted by — the FAA. The Third Circuit noted that "even if the agreement explicitly waived Quilloin's right to pursue class actions, the Pennsylvania law prohibiting class-action waivers is surely pre-empted by the FAA under *Concepcion*." The court also recounted its decision in *Litman v. Cellco*, in which it held a similar New Jersey law to be pre-empted by the FAA. The *Quilloin* Court explained, "[l]ike the law in *Litman*, the Pennsylvania law 'seeks to impose class arbitration despite a contractual agreement for individualized arbitration' and is therefore pre-empted."

Finally, Quilloin argued that the arbitration agreement was unconscionable because it "would permit Tenet to 'run out the clock' on the statute of limitations." Under the FTP, employees were required to follow various internal steps before proceeding to arbitration, but Tenet had only approximate time limits within which to respond to each step. According to Quilloin, by proceeding slowly, Tenet could effectively use up the statute of limitations time before she has a chance to proceed to arbitration. The court rejected this argument, explaining that, notwithstanding the inexact guidelines for Tenet, the arbitration agreement did not shorten Quilloin's statute of limitations and, in any event, the court further observed that Quilloin "always had the option to [file a] motion to compel arbitration."

The Third Circuit concluded that Quilloin could not demonstrate that the arbitration agreement was substantively unconscionable. The court then determined that the agreement was also not procedurally unconscionable, because Quilloin did not lack a "meaningful choice" in accepting the agreement. The court noted that Quilloin had a college degree and accepted the agreement on two separate occasions.

Concluding that the district court had erred in declining to compel arbitration, the court reversed.

Employers that are rolling out new arbitration agreements should incorporate guidance from *Quilloin*. Employers with existing agreements should ensure that their approach is consistent with *Quilloin*. With regard to class-action waivers, *Quilloin* holds that they are enforceable. Employers should consider including them in arbitration agreements. In light of *Quilloin*, employers should also include a provision requiring the parties to submit arbitrability issues to the arbitrator. Other helpful drafting points from the *Quilloin* decision are: (1) the agreement should not take away an employee's ability to recover attorneys' fees; and (2) the agreement should avoid reducing the employee's time to assert claims. ■